Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

In Re: LINDA SANDERS
Petitioner

v.

MARGARET FUNK,
COLORADO ATTORNEY REGULATORY BOARD,
COLORADO SUPREME COURT
Respondents

Petition for Extraordinary Writs of Prohibition and Mandamus

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Questions Presented

1. Do the rules under which the Attorney Regulation Counsel investigates and prosecutes attorneys at law reach into the private realm of lay people? If so, does a *subpoena* served upon the accused lay person violate their rights protected by the 4th Amendment?

2. Does the Colorado Supreme Court conduct a property taking, in violation of the 5th Amendment, and Art. I § 10 of the U.S. Constitution (precluding a state from making any law that impairs the obligation of contracts) when they forbid the application of that portion of the Power of Attorney Act which authorizes a Grantee to appear on behalf of a Grantor in court?

RELIEF SOUGHT UNDER A WRIT OF PROHIBITION

1. Petitioner seeks to prohibit the Colorado Attorney Regulatory Board, under the supervision of the Colorado Supreme Court, from executing on a *Subpoena* they served on Petitioner, for the purpose of investigating and possibly prosecuting her for the unauthorized practice of law. There is no civil or criminal case pending between the parties, and the *Subpoena* violates this Petitioner's constitutionally protected rights guaranteed under the 4th and 5th Amendments. Additionally, the investigation is without just cause because Petitioner was performing under the authority of a Power of Attorney granted by an individual. Absent language to the contrary, the Uniform Power of Attorney Act specifically provides for a *pro se* litigant to assign their right to appear in court to another non-attorney.

RELIEF SOUGHT UNDER A WRIT OF MANDAMUS

2. Petitioner seeks an order from this Court to compel the Colorado courts to acknowledge that they may not "impair the obligation of contracts" [Art. 1 § 10] authorized under the Uniform Power of Attorney Act.

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The Appendix contains two Rulings. The first is from the Colorado Supreme Court, dated January 27, 2007, summarily denying a Petition to Quash Summons without addressing the jurisdictional challenge and constitutional issues raised in support of the Petition to Quash. Upon entry of that State Court Order denying relief, the action was removed to federal court. The Federal Court remanded the matter on April 17, 2007, without a ruling on the issues, and denying a motion to certify questions to the State Supreme Court regarding the jurisdictional challenge and constitutional questions.

STATEMENT OF JURISDICTION

This Petition is submitted pursuant to Supreme Court Rule 20, and 28 U.S.C. §1651(a).

PARTIES AND RELIEF REQUESTED

1. A Writ of Prohibition is sought against Ms. Margaret Funk, Esquire, representative of the Colorado Attorney Regulation Counsel, because she served a *Subpoena* on this Petitioner, in violation of the 4th Amendment to the Constitution, applicable to the States through the 14th Amendment.

2. A Writ of Prohibition is sought against the Office of Attorney Regulation Counsel because they are the source of the challenged *subpoena.*

3. A Writ of Prohibition is sought against the Colorado Supreme Court, as the supervising agency of the Attorney Regulation Counsel. Additionally, a Writ of Mandamus is sought against the Colorado Supreme Court to compel them to apply the Power of Attorney Act as currently enacted.

4. A Writ of Prohibition is sought against the People of the State of Colorado, because they are the alleged Petitioner and Party to the State action against Linda Sanders.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

4th Amendment to the U.S. Constitution:

"The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, . . .".

5th Amendment to the U.S. Constitution:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; . . ."

7th Amendment to the U.S. Constitution:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."

Art. I § 10 of the U.S. Constitution:

"No State shall . . . make any law impairing the Obligation of Contracts . . .".

C.R.S. 15-1-1301, *et. seq.*

§ 1304: "By executing a statutory power of attorney with respect to a subject listed in section 15-1-

1302(1)[1], the principal, except as limited or extended by the principal in the power of attorney, empowers the agent, for that subject to: (a) Demand, receive and obtain by litigation or otherwise, money or other thing of value . . .

§ 1313: "In a statutory power of attorney, the language with respect to claims and litigation empowers the agent to: (a) assert and prosecute before a court or administrative agency a claim, claim for relief, cause of action, counterclaims, offset, and defend against an individual, a legal entity or government, including suits to recover property or other thing of value, to recover damages sustained by the principal . . ."

RELATED ISSUE IN A CASE BEFORE THIS COURT

Currently before this court is a Petition for Certiorari: ***Suzanne Shell v. People, Case No. 06-10240.*** That case is published as *People v. Suzanne Shell*, 148 P. 3d 162, and has been quoted in support of actions taken against this Petitioner.

The Shell Petition involves the Power of Attorney Act, and challenges the procedures employed by the Colorado Attorney Regulation Counsel when investigating and prosecuting non-lawyers for alleged unauthorized practice of law. The significant part of the Shell case is that the Colorado Supreme Court specifically states that, while Shell operated under the authority of the Power of Attorney Act, Shell had been guided by counsel to sign "a Stipulation acknowledging that the statutory power of attorney did not give her the power to practice law without a license." That begs the question: Had Shell, like this Petitioner, *not* signed a stipulation, would the Colorado

---

[1] §1302(1) includes: Transactions in real property, personal property, stocks, bond, commodities banking, business, insurance, estate, ***claims and litigation***, personal maintenance, government benefits programs, retirement and tax matters.

Supreme Court have had to acknowledge the powers granted through the Power of Attorney Act? It appears not, because the Colorado Supreme Court currently still prosecutes the suspected "unlicensed practice of law" whether or not a Power of Attorney is in effect. This Writ is brought because the Power of Attorney Act's plain language is a booby trap. It specifically states that an individual can represent another individual "in any court" yet the Bar is prosecuting people who, to their detriment, rely on that provision of law.

STATEMENT OF CASE AND EXHAUSTION OF REMEDIES

In November, 2006, Petitioner Sanders was granted a Power of Attorney from a defendant in a municipal court matter. Relying on the Uniform Power of Attorney Act[2], Petitioner filed an "Entry of Appearance" on behalf of the grantor of the Power of Attorney. In December, 2006, Petitioner was served a *subpoena* by the Colorado Attorney Regulation Counsel, ordering her to produce evidence against herself because the Attorney Regulation Counsel suspected that Petitioner might be guilty of "unauthorized practice of law". At the time the *subpoena* was served, (and to date), no civil case, nor criminal charges, had been filed against Petitioner. Petitioner Sanders filed a Petition to Quash the *subpoena* asserting protection conveyed through the 14th Amendment, and under the 4th and 5th Amendments to the U.S. Constitution. The Attorney Regulation Counsel immediately motioned for a Hearing Master to address the issue. Those issues were ruled on by the Colorado Supreme Court, with a summary denial. [Appendix, pp 1,2.] Rather than participate in an inquisition, Petitioner Sanders removed the investigation [*People v. Sanders*, 06 UPL 72] to federal court, asserting that the U.S. District Court had jurisdiction to adjudicate

[2] C.R.S. 15-1-1301, *et. seq.* relevant parts reproduced herein.

the constitutional questions raised by the service of the *subpoena*. Sanders claimed that (a) the Attorney Regulation Counsel had no jurisdiction over lay people; (b) the *subpoena* served on her violated her right to be secure in her papers and effects; (c) the Attorney Regulation Counsel was guilty of a property taking by interfering with a lawful contract authorized under the Power of Attorney Act and protected by Art. I § 10 of the U.S. Constitution; (d) the investigation conducted by the Attorney Regulation Counsel was a violation of the 5th Amendment as related to being a witness against oneself and (e) the entire investigation blatantly violated the well-settled "Balance of Powers" doctrine, in that the same entity that interprets the issue, and prosecutes it, is the same entity that decides the winner. Especially confusing in this matter is the fact that the Colorado Supreme Court's Order is entered in the name of the "People of the State of Colorado" yet the executive branch did not bring any charges. The jurisdiction appears to be illegitimate.

On **April 17, 2007**, the U.S. District Court, entered an order denying Sanders' Petition to Remove the action to the federal jurisdiction, and also denied her motion to certify the constitutional questions to the Colorado Supreme Court. [Appendix, pp. 3-5.] **Because Sanders' has no other court to turn to for protection of her rights, this Petition for a Writ is justified.** Sanders' is threatened with fines and jail (under the alleged authority of Colo. Rules Civil Procedure, Rule 232[3]). While such punishment is potentially severe, the accused is not entitled to due process, because, states the Colorado Supreme Court, the procedures employed in such a prosecution are exempt from otherwise constitutional restraints because the jurisdiction enjoyed by the Attorney Regulation Counsel is

[3] The punishment is provided by Rule – because the Unauthorized Practice of Law statute (C.R.S. 12-5-101) has no implementing provision for its violation.

"*sui generis*" – it is not civil, nor criminal nor administrative, *Smith v. Mullarkey*, 121 P. 2d 890.

BEST INTERESTS OF THE PUBLIC AND DISPARATE TREATMENT

While the Attorney Regulation Counsel uses the pretext that the public must be protected from incompetence, it should be noted that in the cases at Bar, the Petitioners are competent individuals, trained in legal procedures[4], whose skills are denied the public, with no support in law, thus forming a virtual monopoly on the business of law. The entire Shell prosecution began because a mother served discovery demands herself, because her attorney neglected to do so, weakening the mother's position. Rather than the attorney being prosecuted for violating Rules of Professional Conduct, Rule 1.2 ("a lawyer shall abide by a client's decisions and shall consult with the client as to the means by which they are to be pursued") the Colorado Supreme Court noted that the *pro se* litigant served discovery "without the consent of the lawyer". (*Shell*, at page 171). It is apparent that the Colorado Supreme Court, and the Office of Attorney Regulatory Counsel [hereinafter "OARC"] does not endorse the public's right to exercise control over their litigation, as provided for in the Power of Attorney Act, and the constitutionally protected right to contract. The rule of law is being trampled. Additionally, even when the parties operate under the Power of Attorney Act, the OARC investigates such private activity by violating the individual's rights as protected by the 4th and 5th amendments.

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[4] Shell teaches family law for several Bar Associations, including Colorado, and her course merits between 5 and 9 CLE credits.

ARGUMENT

THE UNAUTHORIZED PRACTICE OF LAW V. THE POWER OF ATTORNEY ACT

When performing under the authority of a Power of Attorney, the agent/grantee is not guilty of "unauthorized practice of law" because they are authorized by the grantor, who is entitled to assert and defend their own litigation.

The Uniform Power of Attorney ["PoA"] Act, adopted by most of the States, is published by Colorado at C.R.S. 15-1-1301 *et. seq*. The single most obvious section of the Act is C.R.S. 15-1-1313 that clearly states,

> "***In a statutory power of attorney, the language with respect to claims and litigation empowers the agent to:***
>
> ***(a) Assert and prosecute before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, offset, and defend against an individual, a legal entity, or government***, including suits to recover property or other thing of value, to recover damages sustained by the principal, to eliminate or modify tax liability, or to seek an injunction, specific performance, or other relief;
>
> (b) Bring an action to determine adverse claims, intervene in litigation, and act as *amicus curiae*; . . .
>
> [Emphasis added].

Section 1313 continues identifying the many legal transactions that can be lawfully performed by the grantee of a Power of Attorney without limiting those acts to licensed attorneys. Again, at **C.R.S. 15-1-1304**, the statute states in relevant part:

> **"Construction of powers generally:**
>
> (1) By executing a statutory power of attorney with respect to a subject listed in section 15-1-1302 (1)[5], the principal, except as limited or extended by the principal in the power of attorney, **empowers the agent**, for that subject to:
>
> (a) **Demand, receive, and obtain by litigation** or otherwise, money or other thing of value to which the principal is, may become, or claims to be entitled; and conserve, invest, disburse, or use anything so received for the purposes intended; . . .
>
> (b) Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction, and perform, rescind, reform, release, or modify the contract or another contract made by or on behalf of the principal;
>
> (c) Execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument the agent considers desirable to accomplish a purpose of a transaction;

---

[5] "The statutory power of attorney may be used to grant an agent powers with respect to property and financial and other matters of the principal."

(d) ***Prosecute, defend,*** submit to arbitration, settle, and propose or accept a compromise with respect to, a claim existing in favor of or against the principal or intervene in litigation relating to the claim;

(e) Seek on the principal's behalf the assistance of a court to carry out an act authorized by the power of attorney;

(f) Engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant;

(g) . . ."

With clear and unambiguous language, the Power of Attorney Act authorizes the use of a principal/agency agreement between parties to do anything that the principal can lawfully do for himself. One cannot assert that the foregoing language is intended to mean that the principal may only hire an attorney to perform all those acts, because the foregoing statute, at paragraph (f) clarifies that by also specifying separately, to wit: " . . . (f) engage, compensate and discharge an attorney . . .".

Because a *pro se* litigant is not guilty of Unauthorized Practice of Law, then a person acting *pro se* in another's stead under the Power of Attorney Act, is ***also not guilty*** of Unauthorized Practice of Law. In actuality, the PoA statute makes the two individuals as one and the same. Whatever the grantor can lawfully do – their delegate can do for them. Further, one cannot assert that the Power of Attorney Act is intended only for minors, dead people or incompetents. Section 1302 warns the grantor that they will be liable for whatever the grantee does in their name, which a minor, dead person or incompetent cannot do.

It has been suggested by members of the Bar that the PoA Act creates an unlawful contract that cannot be enforced. Unlawful to what? Unlawful to the Rules of Professional conduct that do not apply to lay people?

The PoA Act is the law until it is repealed. It should not be superceded by the Rules of Professional Conduct – because those Rules are not applicable to lay people. The OARC's jurisdiction is limited to licensed members of their Bar.

THE UNAUTHORIZED PRACTICE OF LAW STATUTE AND CORRESPONDING RULES AND PROCEDURES FOR PROSECUTING ALLEGED VIOLATORS

The procedures to investigate suspected violators of Unauthorized Practice of Law ("UPL") employed by the Regulatory Counsel involve the use of police powers and *subpoenas*, ordering the accused to produce books and records that will be used against them. The alleged authority for this is Rule 232.5(f)[6].

How does this abuse of power not conflict with the rights of the accused as protected by the 4th Amendment to the U.S. Constitution? How does the Attorney Regulatory Counsel have the authority to order citizens to waive their right to be secure in their papers and effects without offending the U.S. Constitution? How does a lay person become subject to a jurisdiction under the authority of the "Attorney Regulatory Counsel" and its rules when there is no nexus through license? How can the Colorado Supreme

[6] The authority to "issue subpoenas to compel the attendance of respondents and other witnesses or to compel the production of books, papers, documents, or other evidence."

Court construe their rules as superior to the provisions of the Power of Attorney Act, C.R.S. 15-1-1301, *et seq.*?

When prosecuted under UPL, the accused is denied the fundamental right to trial by jury. In the *Shell* case, the Colorado Supreme Court conspicuously avoided citing the UPL statute (C.R.S. 12-5-101) suggesting that the violation is under common law and not a statute. This strategy was necessary to justify denying a jury trial to the accused, because if the State were to charge a violation of the UPL **statute** (C.R.S. 12-5-101) then the accused would have been entitled to a jury trial since, on page 176 of the published *Shell* decision, the Colorado Supreme Court held that "a statutory right to a jury trial [extends] only to violations of state statutes." *Shell* at page 176.

But even assuming Shell was prosecuted under common law, instead of a statute, she still should have had a jury trial because the 7th Amendment guarantees a jury trial "in suits at common law where the value in controversy shall exceed $20 the right to a jury shall be preserved . . . " .

Nevertheless, an examination of the UPL **statute** offers answers to all the above questions. C.R.S. 12-5-101 forbids a person from practicing as,

> "an attorney or counselor ***at law*** . . . without having previously obtained a license for that purpose from the [Colorado] supreme court." [Emphasis added].

There is a difference between an *Attorney/Counselor-at-Law* and an *Attorney-in-Fact.*

An *Attorney-in-Fact* operates under a Principal/Agency contract, protected by Art. I § 10 of the U.S. Constitution, issued by an individual under the authority of statute.

An Attorney-*at-Law* operates with a license issued by the State Supreme Court, that, in exchange for privileges and waiver of certain constitutionally protected rights, the licensee becomes obligated to comply with regulations. When the licensed individual is merely suspected of a violation, they are obligated to cooperate with an investigation against themselves by producing their books and records on demand and accepting a prosecution, judgment and punishment all performed by the same body that, under other circumstances, would cause a conflict of interest. These procedures would be a violation of the individual's constitutionally protected right to due process and privacy under the 4th Amendment ***but for*** the license by which the lawyer waived those rights.

Absent a license agreement, an Attorney-in-Fact cannot be subject to an unconstitutional search and prosecution such as that employed by the Attorney Regulation Counsel on behalf of the Colorado Supreme Court.

DOES THE POWER OF ATTORNEY ACT CREATE A CONTRACT AND IS THAT CONTRACT PROTECTED BY THE CONSTITUTION?

To the extent that an agent is responsible for performing as directed by the grantor under the PoA Act, it creates a contract between the parties. An agent who uses the PoA authority for unsavory means is subject to penalties as provided by law to protect the grantor. Indeed, this fact is a maxim of law, *Vectra Bank v. Bank Western*, 890 P. 2d 259; *Independence Indemnity v. Int'l Trust Co.*, 39 P. 2d 789; *Federal Surety Co. v. White*, 295 P. 281. Therefore, the Power of Attorney Act creates a fiduciary obligation upon the agent and is enforced through the same principles as contract law. The Power of Attorney Act permits performance,

enforceable under contract law. The Constitution forbids a state from making any law that impairs the obligation of contracts, Art. 1 § 10.

This Supreme Court held, in *McCullough v. Virginia*, 172 U.S. 102, (1898) that even though the legislature enacted a law that voided a previous Act (which was a contract between the states and purchasers of state issued coupons) that law could not be enforced because it violated Art. I, § 10 of the U.S. Constitution which forbids any state from impairing a contract.

Therefore, because the Colorado legislature has provided for individuals to contract with counsel of their choice under the Power of Attorney Act, that contract shall not be impaired by the Colorado judiciary, on behalf of the Bar.

COMPELLING REASONS TO GRANT THE WRITS

1. A Writ of Prohibition is Necessary to Prevent Illegal Searches and Prosecutions. The process being employed by the Attorney Regulation Counsel, under the supervision of the Colorado Supreme Court, to prosecute suspected violations of the unauthorized practice of law, is blatantly unconstitutional. Without a civil action, and before charges are filed, the Supreme Court serves a *subpoena* on the accused, in violation of the 5th Amendment, ordering them to produce evidence that may be used against them resulting in potential fines and jail.

2. A Writ of Mandamus is Necessary to Guarantee the Right to Contract. The State judiciary in Colorado, and many other states, is preempting the legislature by voiding portions of the Power of Attorney Act, thereby violating the balance of powers in our government. Citizens who, to their detriment, rely on the

plain language of the law, are being prosecuted fo unauthorized practice of law. Citizens are being denie their right to contract under the Power of Attorney Act i violation of Article 1, Section 10, of the U.S. Constitutio that forbids any state from "impairing the obligation o contracts." It should be made clear that the Attorne Regulatory Counsel can only regulate law among thei licensed members. They cannot interfere with contract made between individuals under the Uniform Statuto Power of Attorney Act. To do so creates an unlawfu monopoly on the business of law that is detrimental to th middle income litigant, and constitutes a property taking i violation of the 5th Amendment.

3. Confusion as to the Power of Attorney Act

Citizens have the freedom and right to select counsel o choice under their right to contract through the Power o Attorney Act. The claim and exercise of a Constitutiona right cannot be converted into a crime. "Where right secured by the Constitution are involved, there can be n rule making or legislation, which would abrogate them.' *Miranda v. Arizona*, 384 U.S. 436.

4. Timely Issue for Evolving Public Needs

The courts are profoundly aware of the exploding number of cases generated by family law litigation. Parents ar forced to perform *pro se* due to their inability to (a) pa attorney fees and (b) not qualify for court appointe counsel. The majority of *pro se* pleadings ar incomprehensible and therefore, the truth is ofte compromised. This Honorable Supreme Court needs t address this issue for public benefit and to define the prope application of the Power of Attorney Act.

5. This is the first case that has ever challenged the Power of Attorney Act against the Unauthorized

Practice of Law. All published case law regarding thi issue is silent on the use of the Power of Attorney Act.

For the foregoing reasons, the undersigne respectfully requests that this Court issue Orders c Prohibition and Mandamus the Colorado Supreme Court.

Respectfully submittec

L. Sande

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

CASE NO. 07SA22

ORIGINAL PROCEDING IN UNAUTHORIZED PRACTICE OF LAW 06 UPL 72

Petitioner:

THE PEOPLE OF THE STATE OF COLORADO,

v.

Respondent:

LINDA SANDERS

ORDER OF THE COURT

Upon consideration of the Petition to Quash and Bri in Support and Petition for Appointment of Presidin Disciplinary Judge as Hearing Master filed in the abo cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition t Quash and Brief in Support shall be, and the same hereby i DENIED.

IT IS FURTHER ORDERED that said Petition for Appointment Presiding Disciplinary Judge as Hearing Master shall be, and the same hereby is, DENIED.

SEAL

BY THE COURT, JANUARY 24, 2007.

Copies mailed via the State's Mail Services Division on 1/24/07 HOP

Margaret Funk, #24560
Assistant Regulation Counsel

Linda Sanders
279 W. Jamison Circle, #53
Littleton, CO 80120

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
LEWIS T. BABCOCK, CHIEF JUDGE

Civil Case No. 07-cv-00192-LTB-CBS

LINDA SANDERS
Plaintiff/Respondent below,

v.

MARGARET FUNK, COLORADO ATTORNEY REGULATORY BOARD,
Defendant/Petitioners below.

ORDER

This case is before me on the recommendation of the Magistrate Judge that Defendant's Motion to Remand Pursuant to 28 U.S.C. § 1447(c) and to Abstain [Doc 6] be granted and that this action be remanded to the Colorado Office of Attorney Regulation Counsel and the Unauthorized Practice of Law Committee of the Colorado Supreme Court. In the alternative, the Magistrate Judge recommends that the action be dismissed based on the Younger abstention doctrine. The Magistrate Judge recommends that should this action be remanded, a certified copy of the Order of Remand shall be mailed by the Clerk of the Court to the Colorado

Office of Attorney Regulation Counsel and the Unauthorized Practice of Law Committee of the Colorado Supreme Court.

The Plaintiff has filed specific written objections to the Magistrate Judge's recommendation. Accordingly, the recommendation has been reviewed *de novo*.

While the Magistrate Judge's analysis of the application of the Younger abstention doctrine has merit, on *de novo* review, I conclude that the remand analysis is correct. Hence, I elect to remand rather than dismiss under the Younger abstention doctrine.

In addition to the Plaintiff's objections to the Magistrate Judge's recommendation, the Plaintiff has moved to certify certain questions to the Colorado Supreme Court pursuant to Colorado Appellate Rule 21.1. I am unpersuaded to exercise my discretion to certify any question to the Colorado Supreme Court pursuant to Colorado Appellate Rule 21.1.

Accordingly,

IT IS ORDERED that the Defendant's Motion to Remand Pursuant to 28 U.S.C. § 1447 (c) is GRANTED and this civil action is REMANDED to the Colorado Office of Attorney Regulation Counsel and the Unauthorized Practice of Law Committee of the Colorado Supreme Court. The

Clerk of this Court shall mail a certified copy of this Order to the Colorado Office of Attorney Regulation Counsel and the Unauthorized Practice of Law Committee of the Colorado Supreme Court.

IT IS FURTHER ORDERED that the Motion to Certify Pursuant to C.A.R. 21.1 is DENIED.

BY THE COURT:
s/ Lewis T. Babcock

Lewis T. Babcock, Chief Judge

DATED: April 17, 2007